

**STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE COMMISSIONER OF HUMAN SERVICES**

In Re: The Revocation of the License of
Marilyn Hoefker
512 South Highway 71
Jackson, MN 56143
to provide family day care under Minnesota
Rules, parts 9502.0300 to 9502.0445

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

Administrative Law Judge Bruce H. Johnson conducted a hearing in this contested case proceeding beginning at 9:30 a.m. on December 10, 2002, at the Jackson County Courthouse, Jackson, Minnesota. The OAH record closed when the hearing ended on December 10, 2002.

Mark T. Steffan, Assistant Jackson County Attorney, Jackson County Courthouse, 405 Fourth Street, Jackson, Minnesota 56143-1588, appeared at the hearing as attorney for Jackson County (the County) and the Minnesota Department of Human Services (the Department). Marilyn Hoefker, 512 South Highway 71, Jackson, MN 56143, was not represented by an attorney and appeared at the hearing on her own behalf.

**THESE FINDINGS OF FACT, CONCLUSIONS, AND RECOMMENDATIONS
ARE PUBLIC, BUT THE HEARING RECORD ON WHICH THEY ARE BASED
CONTAINS INFORMATION THAT IS NOT PUBLIC.**

NOTICES

This Report is only a recommendation to the Commissioner of Human Services and is not a final decision. The Commissioner will make his final decision after reviewing this report and the hearing record. In making that decision the Commissioner may adopt, reject or modify the Findings of Fact, Conclusions, and Recommendation that appear in this report.

Under Minnesota Law,^[1] the Commissioner may not make his final decision until after the parties have had access to this Report for at least ten days. During that time the Commissioner must give any parties adversely affected by this Report an opportunity to file objections to the Report and to present argument supporting their

positions. Parties should contact the office of Wes Kooistra, Acting Commissioner of Human Services, 444 Lafayette Road, St. Paul, Minnesota 55155, to find out how to file exceptions or present argument.

The record of this contested case proceeding closes upon the filing of exceptions to the report and the presentation of argument to the Commissioner, or upon the expiration of the deadline for doing so. The Commissioner must notify the parties and the Administrative Law Judge of the date on which the record closes. If the Commissioner fails to issue a final decision within 90 days of the close of the record, this report will constitute the final agency decision.^[2]

STATEMENT OF ISSUE

Whether Ms. Hoefker has committed violations of family day care program statutes and rules that warrant revocation of her family day care license.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

Background

1. Marilyn Hoefker resides at 512 South Highway 71, Jackson, Minnesota 56143. Ms. Hoefker's fiancé, Terry Hatfield, resides with her. They each have a child residing with them—a boy six years old and a girl seven years old.^[3]

2. During the times referred to in these Findings of Fact, Ms. Hoefker held a Class A license issued by the Department and the County, pursuant to Minnesota Rules, Chapter 9502, to provide family day care at her home in Jackson.^[4] Her licensure allows her to provide day care for ten children, including infants, toddlers, and both school age and pre-school-age children.^[5]

3. Before and after being licensed, Ms. Hoefker has participated in the training that the Department requires for licensed childcare providers.^[6]

Licensure Violations

4. On March 18, 2002, Ms. Hoefker attempted to feed an infant in her care by placing the infant in a car seat and propping a bottle with infant formula in the infant's mouth while Ms. Hoefker was conversing with a visitor to her home. The bottle repeatedly became dislodged from the infant's mouth, and whenever that happened, Ms. Hoefker walked over and propped the bottle back up in order to feed the infant.^[7]

5. On March 18, 2002, Ms. Hoefker placed an infant in her care into a mesh-sided playpen and allowed the infant to sleep there.^[8]

6. On May 3, 2002, at about 11:15 a.m., a social worker employed by the County contacted Ms. Hoefker by telephone. During the course of their telephone conversation, Ms. Hoefker stated that she had yet to provide breakfast for her day care children that day.^[9]

7. On May 5, 2002, at about 10:00 a.m., a visitor came to Ms. Hoefker's home and repeatedly rang the doorbell at the front door with no immediate response. Eventually, three small school-age children opened the front door and invited the visitor to enter the home. When the visitor entered the home, Ms. Hoefker was not present on the first floor of the home, but approximately six children were present on the first floor and were unattended by any adult. In addition to the three school-age children who had opened the front door for the visitor, there was also an infant in a car seat, a toddler sitting in a stroller, and a girl approximately four years old standing on a stool making toast without adult supervision. Ms. Hoefker subsequently came down to the first floor from upstairs and had a conversation with the visitor. During that conversation, Ms. Hoefker used profanity in the presence of the children under her care. But that profanity was not directed toward the children.^[10]

8. On June 3, 2002, at approximately 3:00 p.m., Ms. Hoefker's and Mr. Hatfield's two children and one other child to whom Ms. Hoefker was providing child care were playing outside in a neighbor's garden without adult supervision.

9. On June 6, 2002, at approximately 3:00 p.m., Ms. Hoefker's and Mr. Hatfield's two children and one other child to whom Ms. Hoefker was providing day care that afternoon were playing in a ditch in Ms. Hoefker's front yard immediately adjacent to U.S. Highway 71 without any adult supervision present and available for assistance. The children were playing near or on the highway surface.^[11] A passing motorist saw the children playing on the highway surface, stopped her car, and told the children to get away from the highway.^[12]

10. On another morning in June 2002, Ms. Hoefker's and Mr. Hatfield's two children and one other child to whom Ms. Hoefker was providing day care walked into a greenhouse at a neighboring business. At that time, there was again no adult supervision present and available for the children's protection and assistance.^[13]

11. On July 8 and 9, 2002, the parent of a child to whom Ms. Hoefker was providing day care arrived at Ms. Hoefker's home and found her asleep while a number of day care children were present.^[14]

12. On October 2, 2002, a social worker employed by the County went to Ms. Hoefker's home. The social worker knocked on the door and rang the doorbell for several minutes before Ms. Hoefker opened the door and invited the social worker inside. Ms. Hoefker indicated that she had been sleeping and had not initially heard the

doorbell or the knocking. When the social worker entered the home, she saw a toddler inside to whom Ms. Hoefker was providing child care.^[15]

Subsequent Licensure Actions

13. On June 7, 2002, the County issued a correction order to Ms. Hoefker based on multiple violations of the rule requiring adequate supervision of children in care,^[16] violations of the rule requiring appropriate child behavioral guidance,^[17] violation of the rule requiring appropriate feeding of infants,^[18] and violation of the rule requiring outside play space to be protected from traffic.^[19] Ms. Hoefker did not appeal or challenge that correction order. When she did not make the corrections indicated in a timely fashion, the County issued two further correction orders relating to some of the items listed on the June 7, 2002, order.^[20] Ms. Hoefker did not report that all items described in the original correction order had been corrected until July 29, 2002.^[21]

14. On August 2, 2002, the County issued another correction order to Ms. Hoefker based on another violation of the rule requiring adequate supervision of children in care,^[22] violations of the rule requiring appropriate child behavioral guidance,^[23] violation of the statute prohibiting smoking in her home during child care hours.^[24] Again, Ms. Hoefker did not appeal or challenge that correction order, and she never reported to the County that any of the required corrections had been performed

15. After the second correction order, the County recommended that the Department revoke Ms. Hoefker's family child care license.^[25]

16. The Department accepted the County's recommendation and on October 2, 2002, issued an Order of Revocation that revoked Ms. Hoefker's license to provide family childcare.^[26]

17. Ms. Hoefker subsequently exercised her right to appeal the Order of Revocation, and this administrative contested case proceeding ensued.

Other Considerations

18. Three of the parents of children under Ms. Hoefker's care are satisfied with the services that she provides and believe that participation in her program is a positive experience for their children.^[27]

19. No child in Ms. Hoefker's care has actually become ill or been injured as the result of any of her violations of licensing standards.

Other Findings

20. These Findings are based on all of the evidence in the record. Citations to portions of the record are not intended to be exclusive references.

21. The Memorandum that follows explains the reasons for these Findings of Fact, and to the extent that the Memorandum may contain additional findings of fact,

including findings on credibility, the Administrative Law Judge incorporates them into these Findings.

22. The Administrative Law Judge adopts as Findings any Conclusions that are more appropriately described as Findings.

Based upon these Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. Minnesota law gives the Administrative Law Judge and the Commissioner of Human Services authority to conduct this contested case proceeding and to make findings, conclusions, and recommendations or a final order, as the case may be.^[28]

2. The Department and the County gave proper and timely notice of the hearing, and they have also fulfilled all procedural requirements of law and rule so that this matter is properly before the Administrative Law Judge.

3. Minnesota law^[29] establishes the burden of proof and of producing evidence in proceedings to appeal revocations of family day care licenses:

[T]he Commissioner may demonstrate reasonable cause for action taken by submitting statements, reports, or affidavits to substantiate the allegations that the license holder failed to comply fully with applicable law or rule. If the Commissioner demonstrates that reasonable cause existed, the burden of proof in hearings . . . shifts to the license holder to demonstrate by a preponderance of the evidence that the license holder was in full compliance with those laws or rules that the Commissioner alleges the license holder violated, at the time that the Commissioner alleges the violations of law or rules occurred.

4. Ms. Hoefker established by a preponderance of the evidence that between March 18, 2002, and July 9, 2002, she did not violate family child care program rules by smoking in her home during child care hours,^[30] by using profane and vulgar language with children in care,^[31] or by threatening, humiliating, or frightening one child in a walker and another with a threat of spanking.^[32]

5. But Ms. Hoefker failed to establish by a preponderance of the evidence that between March 18, 2002, and July 9, 2002, she was in full compliance with the family child care program rules requiring adequate supervision of children in care on the six occasions that the County alleged she was not in compliance.^[33] She also failed to establish by a preponderance of the evidence that during that same period, she was in full compliance with the family child care program rules prohibiting caregivers from

placing infants into mesh-sided cribs to sleep,^[34] prohibiting caregivers from feeding infants by propping bottles in their mouths,^[35] and requiring caregivers to provide children in care with timely and well-balance meals.^[36] Ms. Hoefker therefore failed to establish by a preponderance of the evidence that she was in full compliance with applicable program laws and rules during that period.

6. Minnesota Statutes, section 245A.06, subdivision 3, provides:

If the commissioner finds that the applicant or license holder has not corrected the violations specified in the correction order or conditional license, the commissioner may impose a fine and order other licensing sanctions pursuant to section 245A.07.

7. Minnesota Statutes, section 245A.07, subdivision 1, provides:

Subdivision 1. **Sanctions available.** In addition to making a license conditional under section 245A.06, the commissioner may propose to suspend or revoke the license, impose a fine, or secure an injunction against the continuing operation of the program of a license holder who does not comply with applicable law or rule. When applying sanctions authorized under this section, the commissioner shall consider the nature, chronicity, or severity of the violation of law or rule and the effect of the violation on the health, safety, or rights of persons served by the program.

8. Between March 18, 2002, and July 9, 2002, Ms. Hoefker displayed a chronic inattentiveness to the health and safety of the children under her care.

9. Even though no child under her care may have suffered an illness or injury that was directly related to her numerous licensure violations, all of those violations created potential hazards to the health and safety of children served by her program.

10. The Administrative Law Judge adopts as Conclusions any Findings that are more appropriately described as Conclusions.

11. The Memorandum that follows explains the reasons for these Conclusions, and the Administrative Law Judge therefore incorporates that Memorandum into these Conclusions.

Based upon the these Conclusions, and for the reasons explained in the accompanying Memorandum, the Administrative Law Judge makes the following:

RECOMMENDATION

The Administrative Law Judge therefore respectfully RECOMMENDS that the Commissioner AFFIRM the Department's Order of Revocation dated October 2, 2002.

Dated this 20th day of December 2002.

S/ Bruce H. Johnson

BRUCE H. JOHNSON
Administrative Law Judge

Reported: Tape Recorded (two tapes); No Transcript Prepared.

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NOTICE

Under Minnesota law,^[37] the Commissioner of Human Services is required to serve his final decision upon each party and the Administrative Law Judge by first-class mail.

MEMORANDUM

I. Unsubstantiated Licensure Violations

The County presented evidence of some alleged licensure violations that were not described either in the Department's Order of Revocation or in the Notice of Hearing. For example, the County alleged and presented evidence attempting to establish that Ms. Hoefker has been smoking at her home during child care hours. Principles of due process of law preclude this ALJ and the Commissioner from considering charges or allegations of which the Respondent did not receive fair notice in the Notice of Hearing or an amendment thereof made in accordance with the rules governing contested case proceedings.^[38] The test of adequacy of notice of a charge is whether any failure by the Department to disclose the facts underlying a particular charge would prohibit the Respondent from effectively responding to that charge.^[39] Here, neither the Order of Revocation nor the Notice of Hearing contained any reference at all to Ms. Hoefker violating licensure rules by smoking during child care hours. So, no such charge may be considered in determining whether or not to revoke her family child care license.^[40] Additionally, one witness testified that Ms. Hoefker was asleep and didn't answer the door when a parent arrived to drop off child care children on two occasions. But again, those incidents were not described either in the Department's Order of Revocation or in the Notice of Hearing, and Ms. Hoefker has never been charged with any licensure violation based on that.

The ALJ also concluded that Ms. Hoefker was able to establish by a preponderance of the evidence that she did not commit three of the licensure violations that were described in the Department's Order of Revocation and in the Notice of Hearing. First, the Department and County alleged that Ms. Hoefker used "profane and vulgar language with children in care." Three witnesses testified that on more than one occasion they heard voices coming from within Ms. Hoefker's home yelling with profane and vulgar language at three children playing outside.^[41] But on one occasion, there was disagreement between witnesses whether the voice doing the yelling was male or female.^[42] Another witness could recall no profanity, only "unpleasant yelling."^[43] And in any event, none of the witnesses specifically identified any of the voices as being those of Ms. Hoefker or her fiancé, Mr. Hatfield. On the other hand, both of them denied ever having used profane and vulgar language with children in care. Ms. Hoefker also testified that she recalled that a parent of a child in care had used profanity while in her home and when calling out to that parent's child outside. Finally, Sandra Lamer offered the only evidence directly substantiating a use of profanity by Ms. Hoefker. That occurred when Ms. Lamer was visiting Ms. Hoefker's home at about 10:00 a.m. on May 3, 2002. But that testimony only established that Ms. Hoefker swore at Ms. Lamer in the presence of children in care. The standards contained in the behavior guidance rule^[44] are aimed at direct interactions between a provider and children in care and not toward a provider's interactions with adult visitors to the home. The evidence failed to establish that Ms. Hoefker directed any profanity toward any child in care while Ms. Lamer was visiting.

The Notice of Hearing also alleged two other violations of the behavior guidance rule. First, it alleged that Ms. Hoefker violated those standards by telling a crying child in a walker that she did not have time for the child and then pushing the walker away. Second, it alleged that Ms. Hoefker threatened to spank children as a form of discipline. As to the first allegation, the evidence did establish that Ms. Hoefker told a crying child in a walker that she did not have time for the child and then pushed the walker away.^[45] But that conduct does expressly not fall within the forms of emotional abuse specifically described by the rule.^[46] And there was no evidence that the way in which Ms. Hoefker said and did that caused the child to be threatened, humiliated, or frightened.^[47] In other words, the ALJ concludes that there was a failure of proof on that charge. With regard to the second charge, the evidence established that Ms. Hoefker told a 10-month-old child in care, "You be good or Terry will swap your butt."^[48] But there was no evidence tending to establish that Ms. Hoefker or Mr. Hatfield has ever spanked a child in care. Those words could be interpreted as a threat of spanking, but they could also be interpreted as jest. None of the witnesses shed light on the context and tone of those remarks. So, it was not possible to determine whether or not the child to whom the remarks were directed perceived or reacted to them as an actual threat of spanking. The rule prohibits conduct that threatens, humiliates, or frightens a child. Given the ambiguous nature of Ms. Hoefker's remarks and the fact that the child was only ten months old, there needed to be some evidence that the child understood Ms. Hoefker's remarks to be a threat of spanking, and that the child was actually frightened by what was being said. There was no such evidence.

II. Substantiated Licensure Violations

On the other hand, a preponderance of the evidence did establish that Ms. Hoefker has committed violations of licensure rules on several other occasions. She did not directly contradict or dispute evidence that she had placed an infant into a playpen with mesh siding for a place to sleep in violation of a licensure rule.^[49] She also did not contradict or dispute that she had failed to feed breakfast to children in care until 11:15 a.m. on one occasion,^[50] or that she had fed an infant in care by propping a bottle in the infant's mouth in violation of another rule.^[51] More important, a preponderance of the evidence established that on six separate occasions over a five-month period Ms. Hoefker failed to provide adequate supervision to children under her care. She did not dispute the evidence relating to four instances where she failed to provide adequate supervision to children in care who were inside her home.^[52] And although Ms. Hoefker did challenge allegations of inadequate supervision of outdoor activities, the issues that she raised did not establish that violations had not occurred. For example, she testified that of the three children involved in the outdoor incident, two of them were her own and Mr. Hatfield's children, and only one was a child in care.^[53] But the fact remains that at least one of the three children was a child under her care. Ms. Hoefker also testified that during the incidents cited by the County, she was actually watching the children from a bay window in her home. But again, that does not negate the existence of a violation. The rule provides that "supervision" means "a caregiver being available for assistance and care so that the child's health and safety is protected."^[54] Watching children playing on or near a busy highway, or on adjacent property, indoors from a bay window does not represent being available for assistance and care.

III. Remedy

The Department's licensing rules list what should be considered in determining the kind of remedy to impose for substantiated violations of licensure standards:

Subp. 2. **Information to be considered before imposing a negative licensing action.** The commissioner shall consider the following information before issuing a negative licensing action:

- A. the laws or rules that have been violated;
- B. the nature and severity of each violation;
- C. whether the violation is recurring or nonrecurring;
- D. the effect of the violation on persons served by the program;
- E. an evaluation of the risk of harm to persons served by the program;

F. any evaluations of the program by persons served or their families;

G. relevant facts, conditions, and circumstances concerning the operation of the program; and

H. any aggravating or mitigating factors related to the violation.

Ms. Hoefker introduced signed but unsworn statements from three parents of children under her care expressing their beliefs that their children were receiving good care from Ms. Hoefker, and that none of them had ever noticed the kinds of violations that the County and Department have charged her with in this proceeding. But since none of them were present during the incidents that were actually cited, they are not in a position to contradict any of the witness testimony, and their statements have limited, if any, probative value. If one looks at the total of nine substantiated licensure violations in context, what one sees is a pattern of continuing inattention to the needs and safety of children under care over a five-month period. Moreover, Ms. Hoefker did not really come forward accept any responsibility for that inattentiveness. In fact, the evidence established that she violated the supervision rule again on October 2, 2002—the very day her license was being revoked.^[55] So there is no real assurance here that that Ms. Hoefker’s pattern of inattentiveness has been broken. In short, the ALJ concludes that Ms. Hoefker’s chronic inattentiveness to the needs and safety of children under care poses a risk of harm to those children. The ALJ therefore concludes that the Department’s decision to revoke her license to provide family child care was warranted and should be upheld.

B. H. J.

^[1] Minnesota Statutes, section 14.61. (Unless otherwise specified, all references to Minnesota Statutes are to the 2000 edition.)

^[2] See Minnesota Statutes, section 14.62, subdivision 2a.

^[3] Testimony of Marilyn Hoefker.

^[4] Testimony of Soneva Goering.

^[5] *Id.*

^[6] Exhibit I; Testimony of Marilyn Hoefker.

^[7] Testimony of Amy Thier.

^[8] *Id.*

^[9] Testimony of Terry Whitman.

^[10] Testimony of Sandra Lamer.

^[11] Testimony of Chad Heiden, Melonie Vancura, and David Stubbe.

^[12] Testimony of Brenda Weinrebe.

^[13] *Id.*

- [14] Testimony of Wannetta Weinrebe.
- [15] Testimony of Terry Whitman.
- [16] Minnesota Rules, part 9502.0315, subpart 29a.
- [17] Minnesota Rules, part 9502.0395.
- [18] Minnesota Rules, part 9502.0415.
- [19] Minnesota Rules, part 9502.0425; see *generally* Exhibit 1.
- [20] Exhibit 1.
- [21] Exhibit 1.
- [22] Minnesota Rules, part 9502.0315, subpart 29a.
- [23] Minnesota Rules, part 9502.0395.
- [24] Minnesota Statutes, section 144.414, subdivision 3; see *generally* Exhibit 1.
- [25] Testimony of Soneva Goering.
- [26] Exhibit 6.
- [27] Exhibits B, C, D, and E.
- [28] Minnesota Statutes, sections 14.50, 14.57, 14.69, and 245A.01 through 245A.16.
- [29] Minnesota Statutes, section 245A.08, subdivision 3(a).
- [30] Minnesota Statutes, section 14.414, subdivision 3.
- [31] Minnesota Rules, part 0395.
- [32] *Id.*
- [33] Minnesota Rules, part 0315, subdivision 29a.
- [34] Minnesota Rules, part 0425, subpart 9.
- [35] Minnesota Rules, part 0415, subpart 4.
- [36] Minnesota Rules, part 0445, subpart 3.
- [37] Minnesota Statutes, section 14.62, subd. 1.
- [38] Minnesota Rules part 1400.5600, subpart 5; see *In re Ruffalo*, 390 U.S. 544 (1968) *rehearing denied*, 391 U.S. 961, and *In re Graham*, 453 N.W.2d 313, 316 (Minn. 1990), cert. denied, 498 U.S. 820 (1990).
- [39] *Zotos Int'l v. Kennedy*, 460 F.Supp. 268, 274 (D.D.C. 1978).
- [40] As a practical matter, even if such a charge could be considered, the County failed to prove it by a preponderance of the evidence. The evidence established that both Ms. Hoefker and her fiancé, Mr. Hatfield, smoke, and that on one occasion a social worker detected a heavy odor of cigarettes in her home. But there was no direct evidence that either she or Mr. Hatfield smoked during child care hours, and both of them denied under oath having done so.
- [41] Testimony of Amy Their, Wanda Jerousek, and David Stubbe.
- [42] Compare testimony of Wanda Jerousek with testimony of David Stubbe.
- [43] Testimony of Melonie Vancura.
- [44] Minnesota Rules, part 9502.0395.
- [45] Ms. Hoefker did not challenge or contradict that testimony.
- [46] See Minnesota Rules, part 9502.0395, subpart 2A.
- [47] *Id.*
- [48] Testimony of Sandra Lamer.
- [49] Minnesota Rules, part 9502.0425, subpart 9.
- [50] Minnesota Rules, part 9502.0445, subpart 3

^[51] Minnesota Rules, part 9502.0415, subpart 4.

^[52] See Findings of Fact Nos. 7, 11, and 12.

^[53] The County argued that her children and Mr. Hatfield's should be considered children in care citing Minnesota Rule part 9502.0365, subpart 1A. But that rule only provides that a caregiver's children must be considered in determining whether a caregiver is exceeding licensed capacity. The rule does not evidence an intent to treat a caregivers children as children under care for any other purpose.

^[54] Minnesota Rules, part 9502.0315, subpart 29a.

^[55] See Finding of Fact No. 12.